

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Jessica R. Cooper, Presiding Judge

SCOTT M. CAIN
Plaintiff-Appellee,

v

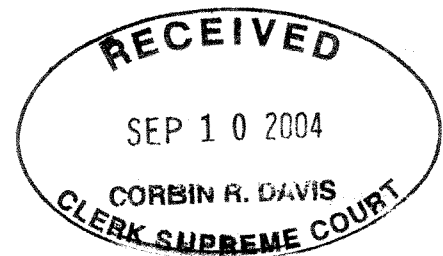
WASTE MANAGEMENT, INCORPORATED
TRANSPORTATION INSURANCE COMPANY
Defendants-Appellees and Appellants,

Docket nos. 125180 and 125111

and

SECOND INJURY FUND
Defendant-Appellant and Appellee.

BRIEF ON APPEAL - AMICUS CURIAE FORD MOTOR COMPANY



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STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT

The Court has jurisdiction to review the opinion that was entered by the Court of Appeals in *Cain v Waste Mgt, Inc*, 259 Mich App 350; 674 NW2d 383 (2003) on November 6, 2003, by the authority of the Workers' Disability Compensation Act of 1969, MCL 418.101, et seq. MCL 418.861a(14), second sentence. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 706, 732; 614 NW2d 607 (2000).

STATEMENT OF QUESTIONS PRESENTED¹

I

WHETHER THE WORKERS' COMPENSATION APPELLATE COMMISSION EXCEEDED THE SCOPE OF THE REMAND ORDER OF THE COURT BY AWARDING THE EMPLOYEE WEEKLY COMPENSATION FOR A TOTAL AND PERMANENT DISABILITY.

Plaintiff-appellee Cain answers "No."

Defendants-appellees Waste Mgt - Transportation answer "Yes."

Defendant-appellant Second Injury Fund answers "Yes."

Amicus curiae Ford Motor answers "Yes."

Court of Appeals answered "No."

Workers' Compensation Appellate Comm answered "No."

Board of Magistrates did not answer.

II

WHETHER THE "LOSS OF INDUSTRIAL USE" STANDARD MAY BE APPLIED IN A CLAIM TO WEEKLY COMPENSATION FOR A SCHEDULED DISABILITY DESCRIBED BY MCL 418.361(2)(a) - (l).

Plaintiff-appellee Cain answers "Yes."

Defendants-appellees Waste Mgt - Transportation answer "No."

Defendant-appellant Second Injury Fund answers "No."

Amicus curiae Ford Motor answers "No."

Court of Appeals answered "Yes."

Workers' Compensation Appellate Comm answered "Yes."

Board of Magistrates did not answer.

¹ These four questions were propounded by the Court in the order granting leave to appeal.

III

WHETHER *PIPE v LEESE TOOL & DIE CO*, 410 MICH 510; 302 NW2D 526 (1981) SHOULD BE OVERRULED.

Plaintiff-appellee Cain answers "No."

Defendants-appellees Waste Mgt - Transportation answer "Yes."

Defendant-appellant Second Injury Fund answers "Yes."

Amicus curiae Ford Motor answers "Yes."

Court of Appeals did not answer.

Workers' Compensation Appellate Comm did not answer.

Board of Magistrates did not answer.

IV

WHETHER WEEKLY COMPENSATION AND DIFFERENTIAL COMPENSATION MAY BE AWARDED FOR THE TOTAL AND PERMANENT DISABILITY OF THE LOSS OF BOTH LEGS BY THE TERMS OF MCL 418.361(3)(b) WHEN THE EMPLOYEE HAS THE PHYSICAL LOSS OF ONE LEG AND THE LOSS OF THE INDUSTRIAL USE OF THE OTHER.

Plaintiff-appellee Cain answers "Yes."

Defendants-appellees Waste Mgt - Transportation answer "No."

Defendant-appellant Second Injury Fund answers "No."

Amicus curiae Ford Motor answers "No."

Court of Appeals answered "Yes."

Workers' Compensation Appellate Comm answered "Yes."

Board of Magistrates did not answer.

STATEMENT OF FACTS²

The right leg of plaintiff-appellee Scott M. Cain (Employee) was amputated above the knee and replaced with a prosthesis because of a personal injury arising out of and in the course of employment by defendant-appellee Waste Management, Incorporated (Employer) on October 25, 1988. The left leg was not amputated but much surgery was necessary and a brace provided to restore function. (Employer Appendix 46a)

The Employee filed an application for mediation or hearing with the Bureau of Workers' Disability Compensation (Bureau)³ on August 25, 1992, for base weekly compensation from the Employer and augmentation of the base weekly compensation⁴ from defendant-appellant Second Injury Fund (Fund) for one of the types of total and permanent disability that is described by the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101, et seq., known as the loss of industrial use of both legs.⁵ (Employer Appendix 11a) There was not a particularized claim for one of the types of scheduled disability described by another statute in the WDCA.⁶ (Employer Appendix 22a) The Employer and Fund appeared and contested the claim. (Employer Appendix 4a)

The Bureau then remitted the case to the Board of Magistrates (Board) for hearing and disposition.

² The numbers after "Employer Appendix" are the pages of the appendix on appeal that was filed by defendants-appellants Waste Management, Incorporated, and Transportation Insurance Company in Docket no. 125111 and after "Fund Appendix" are the pages of the appendix on appeal that was filed by defendant-appellant Second Injury Fund in Docket no. 125180.

³ Now the Workers' Compensation Agency.

⁴ Commonly known as differential weekly compensation because the amount of the augmentation of the base weekly compensation is the difference between the amount of the base weekly compensation in the calendar year when the employee was injured and the amount of the base weekly compensation available in each calendar year afterward. MCL 418.521(2).

⁵ MCL 418.361(3)(g).

⁶ MCL 418.361(2)(k).

The Board awarded the Employee base weekly compensation from the Employer and the augmentation of the base weekly compensation from the Fund with the decision that there was the loss of the industrial use of both legs as there was an undenied physical loss of the right leg from amputation and the left leg was "totally useless without a prosthetic device [i.e., the brace]." *Cain v Waste Mgt, Inc*, unpublished order and opinion of the Board of Magistrates, decided on December 3, 1993 (Docket no. 120393017), slip op., 7-8. (Employer Appendix 10a-11a)

The Workers' Compensation Appellate Commission (Commission) reversed with the decision that there was no loss of the industrial use of both legs when considering function with use of prosthetics. A claim that there was a scheduled disability of the left leg was denied because the Employee had failed to make that claim before the evidentiary hearing started before the Board. *Cain v Waste Mgt, Inc*, 1997 Mich ACO 249, slip op., 10-11, 12. (Employer Appendix 22a-23a, 24a)

The Court of Appeals denied leave to appeal. *Cain v Waste Mgt, Inc*, unpublished order of the Court of Appeals, decided on August 7, 1997 (Docket no. 203539).

The Court remanded the case to the Court of Appeals for consideration as on leave to appeal granted. *Cain v Waste Mgt, Inc*, 459 Mich 863; 586 NW2d 87 (1998).

The Court of Appeals reversed the decision by the Commission with the ruling that a determination of a loss of the industrial use of both of the legs to qualify an injured employee as totally and permanently disabled could be made only by the function without the use of an aid such as a prosthetic brace. *Cain v Waste Mgt, Inc*, unpublished opinion of the Court of Appeals, decided on May 2, 2000 (Docket no. 214445), slip op., 3. (Employer Appendix 40a)

The Court granted leave to appeal, *Cain v Waste Mgt, Inc*, 463 Mich 995; 625 NW2d 784 (2001), and reversed the Court of Appeals with the ruling that a determination of a loss of the industrial use of both of the legs could be made only by the function *with* the

use of an aid and remanded the case to the Commission to consider the claim that there was a scheduled disability of the left leg. *Cain v Waste Mgt, Inc*, 465 Mich 509, 524; 638 NW2d 98 (2002). (Employer Appendix 60a-61a)

On remand, the Commission awarded the Employee base weekly compensation from the Employer and augmentation of the base weekly compensation from the Fund with the decision that there was a scheduled disability of the left leg because "the injury to [the] left leg equates with anatomical loss . . . the limb retains no substantial utility" and the loss of the right leg by amputation fulfilled another type of total and permanent disability known as loss of both legs. *Cain v Waste Mgt, Inc*, 2002 Mich ACO 130, slip op., 6-7. (Employer Appendix 32a-33a)

The Court of Appeals granted leave to appeal to the Employer and the Fund and consolidated the two appeals, *Cain v Waste Mgt*, unpublished order of the Court of Appeals, decided on September 6, 2002 (Docket nos. 242104 and 242123) (Fund Appendix 1a), and affirmed. *Cain v Waste Mgt, Inc*, 259 Mich App 350; 674 NW2d 383 (2003). (Employer Appendix 62a-72a)

The Court granted leave to appeal to the Employer and the Fund. *Cain v Waste Mgt, Inc*, 470 Mich 870; - NW2d - (Docket nos. 125111 and 125180, rel'd June 3, 2004). (Fund Appendix 8a, 9a)

SUMMARY OF ARGUMENT

The Court can neither add to nor subtract from the definition of a term provided by any statute.

ARGUMENT

I

THE TWELVE TYPES OF SCHEDULED DISABILITY THAT ARE DESCRIBED BY A STATUTE IN THE WORKERS' DISABILITY COMPENSATION ACT OF 1969 CAN BE ESTABLISHED ONLY BY MEASURING THE AMOUNT OF THE PHYSICAL LOSS OF THE PART OF THE BODY THAT WAS INJURED WITH ONE EXCEPTION.

Currently, there are five different kinds of disability which are described by six separate statutes in the WDCA. MCL 418.301(4). MCL 418.401(1). MCL 418.361(2)(a) - (l). MCL 418.361(3)(a) - (g). MCL 418.373(1). MCL 418.901(a).

Section 301(4), first sentence, and section 401(1), first sentence, were enacted together on May 14, 1987, by 1987 PA 28 and describe one kind of disability as each state that, "[a]s used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease."

The kind of disability which is described by section 301(4), first sentence, and section 401(1), first sentence, is commonly known as general disability by having application to most of the claims for weekly compensation.

There is only one type of general disability.

Section 361(2) first applied on January 1, 1982, after having been enacted by 1980 PA 357 and describes a second kind of disability by stating that,

"[i]n cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:"

This kind of disability is commonly known as scheduled disability from schedule of the length of disability for each physical loss.

There are twelve individual types of scheduled disability as section 361(2)(a) - (l) state that,

"(a) Thumb, 65 weeks.

(b) First finger, 38 weeks.

(c) Second finger, 33 weeks.

(d) Third finger, 22 weeks.

(e) Fourth finger, 16 weeks. * * *

- (f) Great toe, 33 weeks.
- (g) A toe other than the great toe, 11 weeks. * * *
- (h) Hand, 215 weeks.
- (i) Arm, 269 weeks. * * *
- (j) Foot, 162 weeks.
- (k) Leg, 215 weeks. * * *
- (l) Eye, 162 weeks."

Section 361(3)(a) - (g) was enacted on August 1, 1956, by 1956 PA 195 and describes yet another kind of disability by stating that, "[t]otal and permanent disability, compensation for which is provided in section 351 means . . ."

This kind of disability is commonly known as total and permanent disability in reference to the statute.

There are seven individual types of total and permanent disability as section 361(3)(a) - (g) states that,

- (a) Total and permanent loss of sight of both eyes.
- (b) Loss of both legs or both feet at or above the ankle.
- (c) Loss of both arms or both hands at or above the wrist.
- (d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).
- (e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.
- (f) Incurable insanity or imbecility.
- (g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury."

Section 373(1) first applied on January 1, 1982, after having been enacted by 1980 PA 357 and describes the fourth kind of disability by stating that,

"[a]n employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the social security act, 42 U.S.C. 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this act are sought shall be presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under either this chapter or chapter 4. This presumption may be rebutted only by a preponderance of the evidence that the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience. This standard of disability supersedes other applicable standards used to determine disability under either this chapter or chapter 4."

This particular kind of disability is commonly known as retiree disability because of the status of employment of the employee to whom the statute applies.

There is only one type of retiree disability.

Finally, section 901(a) first applied on July 1, 1972, after having been enacted by 1971 PA 183 and describes the fifth kind of disability by stating that, "'[v]ocationally disabled' means a person who has a medically certifiable impairment of the back or heart, or who is subject to epilepsy, or who has diabetes, and whose impairment is a substantial obstacle to employment, considering such factors as the person's age, education, training, experience, and employment rejection."

This particular kind of disability is commonly known as vocational disability in reference to the statute.

There is only this one type of vocational disability.

The Court cannot add or subtract any kind of disability or any individual type of any kind of disability. Certainly, the Court cannot add a thirteenth type of scheduled disability for the loss of a tooth or subtract retiree disability from the WDCA without violating the principle that statutes are enforced as written. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2000). *Mayor of the City of Lansing v Michigan Pub Service*

Comm, 470 Mich 154; - NW2d - (2004). The Court held in the case of *Roberts, supra*, 63, that,

"[a]n anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. *People v Wager*, 460 Mich 118, 123, n 7; 594 NW2d 487 (1999). To do so, we begin with an examination of the language of the statute. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999)."

And in the case of *Mayor of the City of Lansing, supra*, 164-165, the Court recognized that,

"[o]ur task, under the Constitution, is the important, but yet limited, duty to read into and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature.

* * *

... the best measure of the Legislature's intent is simply the words that it has chosen to enact into law. Among other salutary consequences, this approach to reading the law allows a court to assess not merely the intentions of one or two highlighted members of the Legislature, but the intentions of the *entire* Legislature.

(3) The dissent avoids the difficult task of having to read the actual language of the law and determine its best interpretation by peremptorily concluding that MCL 247.183 is 'ambiguous.' *Post* at 174. A finding of ambiguity, of course, enables an appellate judge to bypass traditional approaches to interpretation and either substitute presumptive 'rule[s] of policy,' see *Klapp v United Ins*, 468 Mich 459, 474; 663 NW2d 447 (2003), quoting 5 Corbin, *Contracts* (rev ed, 1998), § 24.27, p 306, or else to engage in a largely subjective and perambulatory reading of 'legislative history.' However, as *Klapp*, relying on the treatises of both Corbin and Williston,

concluded, a finding of ambiguity is to be reached only after 'all other conventional means of [] interpretation' have been applied and found wanting. *Klapp, supra* at 474. Where the majority applies these conventional rules and concludes that the language of MCL 247.183 can be reasonably understood, the dissent, without demonstrating the flaws of the majority's analysis except to assert that its opinion is not in accord with the 'true intent' of the Legislature, opines that an 'ambiguity' exists. An analysis, such as that of the dissent, that is in conflict with the actual language of the law and predicated on some supposed 'true intent' is necessarily a result-oriented analysis. In other words, it is not a legal analysis at all."

Statutes in the WDCA describe how some of the kinds and some of the individual types of disability may be established. Section 361(2)(e), second, third, and fourth sentences. Section 361(2)(g), second and third sentences. Section 361(2)(i), second sentence. Section 361(2)(k), second sentence. Section 361(2)(l), second sentence. Section 361(3)(a), (b), (c), (d), and (e). MCL 418.905.

Section 361(2)(e), second, third, and fourth sentences, describe how to establish five individual types of scheduled disability by stating that,

"[t]he loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of $\frac{1}{2}$ of that thumb or finger, and compensation shall be $\frac{1}{2}$ of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand."

Section 361(2)(g), second and third sentences, describe how to establish two other types of scheduled disability by stating that,

"[t]he loss of the first phalange of any toe shall be considered to be equal to the loss of $\frac{1}{2}$ of that toe, and compensation shall be $\frac{1}{2}$ of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire toe."

Section 361(2)(i), second sentence, defines two more individual types of scheduled disability by stating that, "[a]n amputation between the elbow and wrist that is 6

or more inches below the elbow shall be considered a hand, and an amputation above that point shall be considered an arm."

Section 361(2)(k), second sentence, defines two more types of scheduled disability by stating that, "[a]n amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg."

The last individual type of scheduled disability is actually defined by section 361(2)(l), second sentence. It is singular by describing a degree of function and not a degree of physical loss by stating that, "[e]ighty percent loss of vision of 1 eye shall constitute the total loss of that eye."

Section 361(3)(a), (b), (c), and (d) describe exactly how four of the seven types of total and permanent disability can be recognized. These statutes direct a tally of some of the individual types of scheduled disability by stating that,

"[t]otal and permanent disability, compensation for which is provided in section 351 means:

- (a) Total and permanent loss of sight of both eyes.
- (b) Loss of both legs or both feet at or above the ankle.
- (c) Loss of both arms or both hands at or above the wrist.
- (d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c)."

Section 361(3)(e) separately describes a fifth individual type of total and permanent disability by loss of function, "[p]ermanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm."

Section 905 establishes how to recognize vocational disability by directing attention to the certificate issued by the Division of Vocational Rehabilitation of the Department of Education by stating that,

"[a]n unemployed person who wishes to be certified as vocationally disabled for purposes of this chapter shall apply to

the certifying agency on forms furnished by the agency. The certifying agency shall conduct an investigation and shall issue a certificate to a person who meets the requirements for vocationally disabled certification. The certificate is valid for 2 calendar years after the date of issuance. After expiration of a certificate an unemployed person may apply for a new certificate. A certificate is not valid with an employer by whom the person has been employed within 52 weeks before issuance of the certificate."

The Court cannot add or subtract from these definitions of how these types of disability can be established. *People v Smith*, 246 Mich 393; 224 NW 402 (1929). *Hubbard v Bd of Trustees of Dearborn Retirement Sys*, 319 Mich 395; 29 NW2d 779 (1947). *W S Butterfield Theatres, Inc v Dept of Revenue*, 353 Mich 345; 91 NW2d 269 (1958). *Li v Feldt*, 434 Mich 584; 456 NW2d 55 (1990). The Court held in the case of *Smith, supra*, 396, that,

"[w]e do not intend to split hairs over the meaning of the term, and would feel bound to accept a legislative definition, if indulged, even though at variance with common understanding and all lexicographers, but when the legislature employs a common term as indicative of the purpose of an enactment, without further definition or designation, we must let the term speak its ordinary sense."

And the Court said the same in the case of *W S Butterfield Theatres, Inc, supra*, 349-350,

"[w]ith a range of meanings so diverse, and shades of meaning so abstruse, varying, indeed, with statutory purpose, as we range fields of law from the criminal to the commercial to the governmental, not surprising is it that we find our statute 'supplying its own glossary.' Cardozo, J., in *Fox v. Standard Oil Company, supra*, 95. We are not left dependent upon dialect, colloquialism, the language of the arts and sciences, or even the common understanding of the man in the street. We have the act itself. We need not, indeed we must not, search afield for meanings where the act supplies its own."

Justice Griffin concisely restated this rule in the case of *Li, supra*, 599-600, by stating that, "definitions supplied by the Legislature in a statute are binding on the judiciary." *Li, supra*, 599-600 (GRIFFIN, J., concurring in part and dissenting in part).

There is no statute that defines how to establish general disability, retiree disability, and the other individual types of total and permanent disability so that the Court can and indeed, must. *Smith, supra. Robertson v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002). *Stanton v City of Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002). Again, the Court held in the case of *Smith, supra*, 396, that,

"[w]e do not intend to split hairs over the meaning of the term, and would feel bound to accept a legislative definition, if indulged, even though at variance with common understanding and all lexicographers, but when the legislature employs a common term as indicative of the purpose of an enactment, without further definition or designation, we must let the term speak its ordinary sense."

In the case of *Robertson, supra*, 748, the Court expressly observed that, "[u]nless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning. See MCL 8.3a. See also, *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997)."

Most recently, the Court again said in the case of *Stanton, supra*, 617, "because the motor vehicle exception does not provide a definition of 'motor vehicle,' we are required to give the term its plain and ordinary meaning. MCL 8.3a; *People v McIntyre*, 461 Mich 147, 153; 599 NW2d 102 (1999)."

The Court has carried out this function by describing how general disability, retiree disability, and two types of total and permanent disability can be established. *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). *Peck v Gen Motors Corp*, 164 Mich App 580; 417 NW2d 547 (1987), lv den 431 Mich 872; 429 NW2d 180 (1988). *Redfern v Sparks-Withington Co*, 403 Mich 63; 268 NW2d 28 (1978). *DeGeer v DeGeer Farm Equip Co*, 391 Mich 96; 214 NW2d 794 (1974). *Martin v Ford Motor Co*, 401 Mich 607; 258 NW2d 465 (1977).

In the case of *Sington, supra*, 155-156, the Court explained how general disability could be recognized by implementing the common meaning of *capacity* because section 301(4), first sentence, provided no direct description,

"[w]e begin our analysis with the definition of 'disability' in the WDCA:

As used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss. [MCL 418.301(4).]

As this language plainly expresses, a 'disability' is, in relevant part, a limitation in 'wage earning capacity' in work suitable to an employee's qualifications and training. The pertinent definition of 'capacity' in a common dictionary is 'maximum output or producing ability.' *Webster's New World Dictionary* (3d College ed). Accordingly, the plain language of MCL 418.301(4) indicates that a person suffers a disability if an injury covered under the WDCA results in a reduction of that person's maximum reasonable wage earning ability in work suitable to that person's qualifications and training.

So understood, a condition that rendered an employee unable to perform a job paying the maximum salary, given the employee's qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training would not constitute a disability."

In the case of *Peck, supra*, 592-593, the Court of Appeals described how retiree disability could be discovered because section 373(1) did not include a glossary of *unable, suitable, or qualifications, including training or experience,*

"[t]he statute refers specifically to suitability in terms of the employee's *qualifications* including training or experience. Obviously, used in that connection, the Legislature intended the word 'suitable' to be interpreted in light of educational or job training, types of job performed in the past, work experience, skills and knowledge acquired by training or experience, and the transferability of such skills to other employment.

When the word 'suitable' is interpreted in this manner, the presumption against loss of earnings or earning capacity as the result of a work-related injury or disease is not rendered

meaningless and plaintiff's burden of rebutting such presumption is clearly spelled out.

Relevant inquiries under § 373(1) are: What is the retired employee's residual physical capacity after his work-related injury? What skills and knowledge has he acquired through training or experience? Are these skills transferable to other types of occupations? Are there other jobs to which his skills and knowledge can be transferred within his physical capacity to perform? Under this analytical framework, the retired claimant's burden of rebutting the presumption is twofold: (1) he must establish that he has physical restrictions resulting from a work-related injury or disease, and (2) that these restrictions render him unable to perform work, within or without his field of skill, that is otherwise 'suitable to his qualifications.' In other words, a retired worker must demonstrate by a preponderance of the evidence that the work-related impairment precludes him from performing any other work, either within or without his field of skill, for which he is qualified by virtue of his prior training or experience and to which he can transfer, adapt or utilize job skills and such knowledge previously acquired."

The Court has supplied the way that two of the seven individual types of total and permanent disability can be demonstrated because the WDCA did not. In the case of *Redfern, supra*, 81-82, the Court explained how to establish one type of total and permanent disability — incurable insanity or imbecility per section 361(3)(f) — by first recognizing that law did not have its own definition,

"[l]oss of mental function or a cognitive loss constituting 'incurable insanity or imbecility' has a similar severe affect on the worker's personal life without regard to whether it affects his wage earning capacity.

Mental and cognitive functions are not readily measured. The severity of loss that satisfies the statutory standard is not subject to precise description.

We are persuaded that the legislative purpose was to provide compensation for severe mental illness or cognitive loss comparable in its impact on the quality of the personal, nonvocational life of the worker to the loss of two members or sight of both eyes, the other permanent and total disability categories in the original formulation of the present total and permanent disability provisions. (See fn 1 for text.) Such a loss may also affect the worker's wage earning capacity, but that is not determinative.

A worker who suffers such a severe work-related mental illness or cognitive loss is entitled to total and permanent disability benefits. Where there is no such severe impairment of the quality of life, total and permanent disability benefits, separate and apart from general disability benefits, may not be awarded even if the mental illness or cognitive loss deprives the worker of wage earning capacity."

Further explication was left to further judicial pronouncement. *Redfern*,
supra, 83,

"[w]e are mindful of the imprecision of 'severe', 'comparable', and 'quality of life', but nevertheless have concluded that it is better that further definition evolve in the administrative and judicial decision of individual cases, including these cases on remand."

And the other, seventh type of total and permanent disability — loss of industrial use per section 361(3)(g) — was explained by the Court in the case of *DeGeer*, *supra*, again because the statute itself did not define how to establish that,

"[i]n *Burke v Ontonagon County Road Commission*, 391 Mich 103; 214 NW2d 797 (1974), Justice WILLIAMS has thoroughly reviewed the scope of disability required to bring a claimant within the statutory phrase, 'permanent and total loss of industrial use of both legs * * *.' In *Burke*, this Court adopted the following test:

'There is permanent and total loss of industrial use of both legs where, *inter alia*,

1. An employment-related injury in one or both legs causes pain or other condition that prevents use of both legs in industry.
2. The use of one or both legs, whether or not injured, triggers an employment-related injury or malady in any part of the body, including one or both legs, that causes pain or other condition that prevents use of both legs in industry.' 391 Mich 103, 114; 214 NW2d 797 (1974).

If appellant *DeGeer*, on remand, establishes that the use of his legs produces such disabling back pain that he is no longer able to use his legs to perform any reasonable employment, then he will clearly be eligible for permanent and total disability benefits under [section 361(3)(g)]." *DeGeer*, *supra*, 101-102.

The Court was properly engaged in the process of explaining how to determine disability in these cases because the WDCA did not provide the methodology when describing those particular kinds of disability and those particular types of a kind of disability.

A. THE WORKERS' COMPENSATION APPELLATE COMMISSION SHOULD HAVE CONSIDERED ONLY A CLAIM TO WEEKLY COMPENSATION FOR ONE TYPE OF SCHEDULED DISABILITY BECAUSE OF THE MANDATE BY THE COURT IN *CAIN v WASTE MGT, INC*, 465 MICH 509; 638 NW2d 98 (2002).

The five kinds of disability are mutually exclusive. When one kind of disability applies to a given claim, weekly compensation is calculated for that and only that condition. When one kind of disability applies and ends, weekly compensation may be available because of another. For example, an injured employee having a type of scheduled disability such as the loss of a thumb by the terms of section 361(2)(a) may receive weekly compensation by only the terms of section 361(2), first sentence, during that time but may later claim another kind of disability such as general disability by the terms of section 301(4), first sentence, or retiree disability by the terms of section 373(1). See *Van Dorpel v Haven-Busch Co*, 350 Mich 135; 85 NW2d 97 (1957). Certainly, an adjudication that one kind of disability was not present does not bar the litigation of another kind of disability.

This is not so with the types of scheduled disability or the types of total and permanent disability. *Gose v Monroe Auto Equip Co*, 409 Mich 147; 294 NW2d 165 (1980). In the case of *Gose, supra*, the Court ruled that the broad rule of res judicata was the law and meant that all of the claims for one kind of disability had to be presented at a single hearing. This meant that failure to prove one individual type of one kind of disability — loss of industrial use of both legs — barred a later claim of another type of that same kind of disability — incurable insanity — by stating,

"[t]he expression in *Hlady*:

'the doctrine of res judicata applies not only to facts previously litigated, but also to points of law which were necessarily

adjudicated in determining and deciding the subject matter of the litigation', *Hlady, supra*, 376,

is no expression of a 'narrow' rule but a simple affirmation that the rule of res judicata, whatever its breadth, applies equally to facts and law. Barring a change, under the doctrine, we all agree neither can be relitigated.

I am not persuaded that the scope of the rule should be narrowed.

* * *

There can be but one claim for total and permanent disability. Although the statute recognizes seven alternative bases for it, evidence establishing more than one basis would occasion only one award.

Gose's second petition, although upon a different basis (insanity instead of industrial loss of use of both legs), nonetheless seeks compensation for the same claim of total and permanent disability arising from injury to his left ankle. He was obligated to advance in a single proceeding every alternative basis which could support this claim. Failure to do so bars relitigation of the claim previously resolved against him." *Gose, supra*, 161, 163.

This same principle applies when a case is remanded after deciding that one type of a kind of disability was not established. *CAF Investment Co v Saginaw Twp*, 410 Mich 428; 302 NW2d 164 (1981). *Grievance Adm'r v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000). The Court held in the case of *Grievance Adm'r, supra*, 259-260,

"[u]nder the law of the case doctrine, 'if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.' *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. *Sokel v Nickoli*, 356 Mich 460, 465; 97 NW2d 1 (1959). Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997); see, generally, 5 Am Jur 2d, Appellate Review, § 605, p 300.

Law of the case applies, however, only to issues actually decided, either implicitly or explicitly, in the prior appeal. *Webb, supra* at 209; *Roth v Sawyer-Cleator Lumber Co*, 61 F3d 599, 602 (CA 8, 1995). In denying the Grievance Administrator's application for leave to appeal in this case, we expressed no opinion on the merits. See *Frishett v State Farm Mut Automobile Ins Co*, 378 Mich 733 (1966) (order); cf. *Teague v Lane*, 489 US 288, 296; 109 S Ct 1060; 103 L Ed 2d 334 (1989) (the denial of a writ of certiorari imports no expression of opinion on the merits of the case). Therefore, the law of the case doctrine does not apply. See *Mirchandani v United States*, 836 F2d 1223, 1225 (CA 9, 1988)."

The decision by the Court in *Cain v Waste Mgt, Inc*, 465 Mich 509; 638 NW2d 98 (2002) is not res judicata as it was not final. The decision *is* the law of the case having actually decided the claim by the Employee of one of the seven types of total and permanent disability which was the loss of industrial use of both legs. *Cain, supra*, 524. There, the Court held that,

"[w]e conclude that the 'corrected' standard applied in *Hakala* accords with the intent of the Legislature as expressed in the language of MCL 418.361(3)(g) and is properly applied in the present case. In sum, total and permanent disability is not demonstrated where the proofs indicate that a braced limb is functional and can support 'industrial use.' MCL 418.361(3)(g)."

This meant that no other of the six types of total and permanent disability could be considered. Another *kind* of disability — general disability, retiree disability or scheduled disability — could be. And that is exactly what the Court decreed in *Cain, supra*,

"[w]e reverse in part the May 2000 judgment of the Court of Appeals. We remand to the WCAC to consider plaintiff's specific loss claim [i.e., scheduled disability for the left leg that was not amputated]. [citation omitted]." *Cain, supra*, 524.

Plainly, the explicit mandate by the Court in *Cain, supra*, 524, allowed all later courts to consider and decide ONLY a claim for weekly compensation that was based on a kind of disability other than total and permanent disability.

The Commission and the Court of Appeals did not appreciate the limitation of the mandate of the Court in *Cain, supra*.

B. NO TYPE OF SCHEDULED DISABILITY CAN BE ESTABLISHED BY MEASURING THE LOSS OF THE INDUSTRIAL USE OF THE PART OF THE BODY THAT WAS INJURED.

As reported, statutes in the WDCA define exactly how each of the twelve types of scheduled disability can be established. Eleven types are established by the physical measurement of the bones after a personal injury. One — vision — is measured by physical function.

Paralysis is not included by statute as a way for determining any type of scheduled disability. And *complete loss of industrial use* is not included by statute as a way for determining any type of scheduled disability. *Paralysis* and *complete loss of industrial use* are just not present anywhere in section 361(2)(a) - (l). The Court has no warrant to add them. *Smith, supra*. *W S Butterfield Theatres, Inc, supra*.

Paralysis and *complete loss of industrial use* are present in defining how to recognize another kind of disability, total and permanent disability. Section 361(3)(e) and (g). This also prohibits exporting one or the other to decide a scheduled disability. First, the Court must presume that the presence of *paralysis* and *complete loss of industrial use* in defining total and permanent disability was deliberate and the absence when defining scheduled disability was just as purposeful. *Sebewaing Industries, Inc v Village of Sebewaing*, 337 Mich 530; 60 NW2d 444 (1953). The Court said in the case of *Sebewaing Industries, Inc, supra*, 345, that,

"[t]hat which is expressed puts an end to or renders ineffective that which is implied. *Galloway v. Holmes*, 1 Doug (Mich) 330. So stated in the opinion of 4 members of this Court, the other concurring in the result, in *Taylor v. Public Utilities Commission*, 217 Mich 400 (PUR1922D, 198). *Expressio unius est exclusio alterius*. Express mention in a statute of one thing implies the exclusion of other similar things. *Perry v. Village of Cheboygan*, 55 Mich 250; *Weinberg v. Regents of the University of Michigan*, 97 Mich 246; *Marshall v. Wabash Railway Co.*, 201 Mich 167 (8 ALR 435); *Taylor v. Public Utilities Commission, supra*; *Van Sweden v. Van Sweden*, 250 Mich 238. When a statute creates an entity, grants it powers and prescribes the mode of their exercise, that mode must

be followed and none other. *Taylor v. Public Utilities Commission, supra* (4 Justices); (2 Lewis' Sutherland Statutory Construction [2d ed], §§ 491-493). When powers are granted by statute to its creature the enumeration thereof in a particular field must be deemed to exclude all others of a similar nature in that same field."

Second, while *paralysis* and *complete loss of industrial use* in section 361(3)(e) and (g) may inform other types of total and permanent disability that are not themselves described as the Court ruled in *Redfern, supra*, 81,

"[i]f he loses two members (both legs, both arms, or a leg and an arm) or sight of both eyes, the impairment of normal function and the effect on the worker's personal life is serious.

Loss of mental function or a cognitive loss constituting 'incurable insanity or imbecility' has a similar severe affect on the worker's personal life without regard to whether it affects his wage earning capacity,"

the Court has never thought *paralysis* or *complete loss of industrial use* could inform any of the twelve types of scheduled disability or indeed any kind of disability. And for good reason: to maintain the distinct meaning of each kind of disability and not conflate any of the five kinds of disability.

Finally, it may seem "sound," sensible," or "good public policy" to include *paralysis* or *complete loss of industrial use* as an added way of establishing one or another of the twelve kinds of scheduled disability. That seeming propriety is more apparent than real. The Legislature has not ever thought that this was so. And it is for the Legislature to determine "good public policy" in statutes, not the Court. *Crane v Reeder*, 22 Mich 322 (1871). *Cady v City of Detroit*, 289 Mich 499; 286 NW2d 805 (1939). *Terrien v Zwit*, 467 Mich 56; 648 NW2d 62 (2002). The Court held in one of its earliest decisions, *Crane, supra*, 340, that,

". . . these are considerations of policy appealing to the good sense of the legislature, and bearing as well upon the question of a *proper statute of limitations, as [341 upon the mode of sale. All questions of this kind the legislature have a right to decide, while the courts have none."

The Court only echoed this principle that was expressed in the case of *Crane*, *supra*, by stating in the case of *Terrien*, *supra*, 66-67,

"[i]n defining 'public policy,' it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. This is grounded in Chief Justice Marshall's famous injunction to the bench in *Marbury v. Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803), that the duty of the judiciary is to assert what the law 'is,' not what it 'ought' to be.

In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law. See *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 357; 51 S Ct 476; 75 L Ed 1112 (1931). The public policy of Michigan is *not* merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law. There is no other proper means of ascertaining what constitutes our public policy. As this Court has said previously:

'As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another. 'The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's.' ' [*Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999) (citations omitted).]"

C. *PIPE v LEESE TOOL & DIE CO*, 410 MICH 510; 302 NW2d 526 (1981) IS WRONG AND IS PERNICIOUS.

In the case of *Pipe v Leese Tool & Die Co*, 410 Mich 510; 302 NW2d 526 (1981), the Court said that one type of scheduled disability — section 361(2)(h) — could be established by two different measures, not just one. The Court said in the case of *Pipe*, *supra*, 527, that,

"[t]his standard is: *For purposes of determining an award of specific-loss benefits for the loss of a hand, there must be a showing of either anatomical loss **or** loss of the industrial use of the hand as determined by the loss of the primary service of the hand in industry.*" (emphasis by the Court except boldfaced, supplied)

This ruling was wrong having been reached with a warrantless methodology. The Court decided the case of *Pipe, supra*, without ever considering the statute in the WDCA that actually defines how that type of scheduled disability can be established. The Court did not quote and did not cite section 361(2)(i), second sentence, in the case of *Pipe, supra*. The Court decided the case of *Pipe, supra*, without considering the statute in the WDCA that actually defines twelve types of scheduled disability differently from seven types of total and permanent disability. The Court did not quote and did not cite either section 361(2)(a) - (l) or section 361(3)(a) - (g). Indeed, the Court did not quote or cite any statute in the WDCA as the resource for the law but instead proceeded as if the case were one of common law by saying that the context was the decisions by the Court. *Pipe, supra*, 519. There, the Court actually said that,

"[i]n order to place the present controversy in proper perspective, it is necessary to trace the history of a series of appellate decisions of this jurisdiction, all involving claims for specific-loss benefits for the loss of industrial use of a hand. As will become clear, there appears to be a remarkable consistency in the decisions."

This was wrong. To decide a claim brought by the terms of the WDCA, it is necessary to consider the statute and the relationship of the statute to other, related statutes in the WDCA. Case law may be considered effective only while the statute construed remains unchanged. *Scott v Budd Co*, 380 Mich 29; 155 NW2d 161 (1968). The Court said in the case of *Scott, supra*, 36, that,

"[s]ince our concern is with the proper construction of new language in the statute, decisions of this Court construing prior language are not applicable except insofar as they may afford guidance. It may be noted, however, that the decisions construing the less restrictive language of the prior statute are in accord with our construction of the language here involved."

See *Buzza v. Unemployment Compensation Commission* (1951), 330 Mich 223; *Bedwell v. Employment Security Commission* (1962), 367 Mich 415."

When the text of a statute changes, the prior case law is no longer *stare decisis*.

The case law relied upon by the Court failed to appreciate this. The text of the statute in the WDCA actually defining how to recognize the types of scheduled disability now codified at section 361(2)(e), second and third sentences, section 361(2)(g), second and third sentences, section 361(2)(i), second sentence, section 361(2)(k), second sentence, and section 361(2)(l), second sentence, were enacted by 1927 PA 63 after *Lovalo v Michigan Stamping Co*, 202 Mich 85; 167 NW 904 (1918) and changed the law. In the case of *Pipe, supra*, the Court interpreted the WDCA as if never amended. Regrettably, *Pipe, supra*, was nothing new as many cases after the amendment to the WDCA by 1927 PA 63 proceeded as if the WDCA that was considered in the case *Lovalo, supra*, had not ever been altered. See *Pipe, supra*, 520-521.

The error of the Court in the case of *Pipe, supra*, can also be seen in the absence of any accounting for the authority to export *loss of industrial use* in another statute describing a type of another kind of disability to add to the description of a type of scheduled disability provided by statute. The Court should ask exactly what was the authority for adding text to section 361(2)(i), second sentence.

The decision by the Court in the case of *Pipe, supra*, is pernicious. First, the decision creates two standards of loss of industrial use. The test for the loss of industrial use for total and permanent disability is *with* corrective aids as the Court has already ruled in this case. The test for loss of industrial use for scheduled disability is *without* a corrective aid. While exporting seems to simply broaden the application of a single description, it actually mutates a single description into another.

There is no reason to allow *Pipe, supra*, to remain in view of the disregard of the text defining the type of the kind of disability, the addition of text from a type of a

different kind of disability — total and permanent disability — and conflating the five kinds of disability in the WDCA. No one relies on *Pipe, supra*. No employee has avoided amputation of injured legs (or feet) to preserve a claim of scheduled disability by the terms of *Pipe, supra*. And no employee will have amputation of injured legs (or feet) to create a claim of scheduled disability with overruling of *Pipe, supra*.

The only people who may rely on *Pipe, supra*, are those whose claims were presented and adjudicated by that standard. These people are not affected by an overruling of *Pipe, supra*, because of the rule of res judicata. *Gose, supra*.

D. THE ONE TYPE OF TOTAL AND PERMANENT DISABILITY THAT IS DESCRIBED BY A STATUTE IN THE WDCA AS LOSS OF BOTH LEGS CAN BE ESTABLISHED ONLY BY SEPARATELY MEASURING THE AMOUNT OF THE PHYSICAL LOSS OF EACH LEG.

The only type of total and permanent disability that is available here is for the loss of both legs by the terms of section 361(3)(b) which states, [t]otal and permanent disability . . . means: loss of both legs or both feet at or above the ankle."

The important word in the description of this one type of total and permanent disability is *both*. *Both* means *each one of two* because it is an associative conjunction. *The American College Dictionary* (Random House 2002).

Unquestionably, the Employee has the loss of the right leg because of the amputation above the knee. Section 361(2)(k), second sentence. However, the Employee does not have the loss of the left leg because that leg was not amputated. This means that one leg is lost and not *both*.

RELIEF

Wherefore, amicus curiae Ford Motor Company prays that the Supreme Court reverse the judgment of the Court of Appeals.

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